

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 13 CR 0607
v. : U.S. Courthouse
 : Central Islip, N.Y.
PHILIP KENNER and :
TOMMY C. CONSTANTINE, :
 : TRANSCRIPT OF PROCEEDINGS
Defendants. :
 : November 7, 2014
-----X 11:40 a.m.

BEFORE:

HONORABLE JOSEPH F. BIANCO, U.S.D.J.

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
SARITHA KOMATIREDDY, ESQ.
Assistants, U.S. Attorney

For the Defendants: RICHARD D. HALEY, ESQ.
For Defendant Kenner

ROBERT LaRUSSO, ESQ.
ANDREW OLIVERAS, ESQ.
For Defendant Constantine

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
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Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

1 THE CLERK: Calls case 13 CR 607, United States
2 v. Kenner and Constantine.

3 Counsel, please state appearance for the record.

4 MR. MISKIEWICZ: James Miskiewicz for the United
5 States.

6 Good morning, your Honor.

7 MS. KOMATIREDDY: Saritha Komatireddy.

8 Good morning.

9 MR. LaRUSSO: Robert LaRusso for
10 Mr. Constantine. And Mr. Andrew Oliveras is also here.

11 THE COURT: Good morning.

12 MR. HALEY: Richard Haley for Mr. Kenner, who is
13 seated to my right.

14 THE COURT: Good morning.

15 I see both defendants are here.

16 I have received a series of letters that have
17 come back and forth since the last conference, some of
18 them between counsel that I was cc'd on, as well as ones
19 we have discussed and which were directed to me. I want
20 to speak to those issues.

21 Before we get to the issue of Mr. Kenner's
22 computer, as well as the issue of bail, I do want to
23 address the case overall, and discuss the case going
24 forward and then we can deal with those issues.

25 I know it is reflected in the letters, but why

1 doesn't the government indicate how we are doing with the ³
2 discovery and where it stands?

3 The privileged review is completed I saw from
4 the letter. Is that correct?

5 MR. MISKIEWICZ: Yes, your Honor.

6 Also, the privileged team provided counsel
7 another duplicate set of material that was in the imaged
8 copy in PDF format. So it is another format to review all
9 that material to hopefully resolve the issues previously
10 raised by not being able to have one type of machinery
11 over the other.

12 So, the privileged review I think is on its way
13 to completion. I would imagine at some point Mr. Haley
14 will have discussion with the privileged AUSA, and
15 resolve -- or there may be a dispute about what he views
16 not privileged and what he views as privileged. And that
17 will take place as part of that discussion.

18 As far as Rule 16 discovery, and that came up in
19 some of the back and forth letters, and I feel confident
20 saying Rule 16 is completed, and frankly, completed a long
21 time ago, with respect to material under indictment now.
22 And not to sort of head off Mr. Haley's criticism, but the
23 bottom line is we have provided open file discovery in
24 this case. We provided voluminous materials arising from
25 the civil litigation that follows the defendant in this

1 case.

2 And rather than put the burden on Mr. Haley to
3 apply for CJA funds to obtain material that is a matter of
4 public record in other districts and elsewhere, we have
5 voluntarily provided that. Some of that has not come to
6 us easily, but we provided it in a rolling type fashion.

7 But the material he complained of is for the
8 most part material he was not indicted on under the
9 indictment.

10 As far as Rule 16 is concerned, this is a
11 continuing investigation. There may be other witnesses we
12 eventually need to speak to. There may be other matters
13 or items that we may seek search warrants for and other
14 subpoenaed material may be coming forward either on the
15 existing counts or new counts in the future. But I have
16 no problem representing to the Court that not only have we
17 completed Rule 16, we completed it a long, long time ago.

18 THE COURT: Okay.

19 I will hear from defense counsel in terms of --
20 I did want to address something.

21 I saw the back and forth about inspecting I
22 guess the physical computer. And I don't want to get into
23 a back and forth. But the bottom line is that Mr. Haley
24 just called Mr. Miskiewicz, and arrange a time where you
25 and your client can be present. The marshals will produce

1 your client, and the government will have the computer
2 brought out to Long Island.

3 I don't think it is appropriate -- "appropriate"
4 is the wrong word. But I don't think it is reasonable to
5 send a letter the day before saying I will be at your
6 office tomorrow at 1:00 o'clock and I expect the computer
7 to be there.

8 Call them up and arrange a time available to
9 everybody, and I'm sure it will be done.

10 Let me hear from counsel how you want to
11 schedule the case. Do you wish to set up a pretrial
12 motion schedule? How do you wish to proceed?

13 MR. LaRUSSO: Mr. Conway couldn't be here today
14 and I'm standing in. I have familiarity with the case,
15 but not to the extent he has.

16 I do know we are still reviewing discovery which
17 Mr. Miskiewicz indicated is quite voluminous.

18 My client reminded me that we have been unable
19 to access some of the information on the discovery,
20 particularly some of the emails. In addition, there are
21 some audio tracks that contain nothing audible.

22 So, until I make a complete analysis and compare
23 notes with Mr. Conway, I can't address where we are in
24 view of the discovery.

25 I know there are a number of issues raised both

1 by Mr. Haley and Mr. Miskiewicz, which the Court will be
2 addressing in a few moments.

3 I'm supposed to be down before Judge Spatt for
4 sentencing, and what I will do is impose upon the Court if
5 it is not a problem, to just address two brief matters,
6 and if the Court and counsel can set an adjourned date,
7 and Mr. Oliveras is an attorney who can continue in my
8 absence.

9 Two issues, Judge.

10 As you probably know Mr. Constantine is under
11 very strict conditions of release, the GPS and the home
12 confinement.

13 Quite candidly, his Pretrial Services Officer in
14 his home state has actually asked him to try and leave his
15 home. He has been following scrupulously the Court's
16 directions where they are concerned that he should be
17 getting some diversion from that kind of environment.
18 and what they have done is communicated with Christina
19 Borg (ph) here in the Eastern District, and told them that
20 they would not impose or request to make this kind -- they
21 would not oppose to make this request to your Honor. And
22 it is to let him out of his house within a 100 yard area
23 so he can go across the street to the park with his two
24 children. That is it. But it would be subject to the
25 pretrial officer's approval. There will be no movement

1 out of the house without his knowledge.

2 THE COURT: That is fine.

3 MR. LaRUSSO: I will have an order submitted to
4 the Court with respect to that?

5 THE COURT: Yes.

6 MR. LaRUSSO: I know we have had a number of
7 appearances here, and occasionally the Court would allow
8 Mr. Constantine to waive his appearance.

9 We have agreed on December 9th for adjourned
10 date, and if you could allow us to waive his appearance
11 unless something happens between now and then and he needs
12 to appear and then he can be produced if necessary. He
13 will be on telephone call if necessary, of course.

14 THE COURT: I would not want him to waive his
15 appearance completely. The only thing I would ever allow
16 in this situation if someone is living out of state to
17 occasionally be present on the phone.

18 Let me confirm that with him.

19 Mr. Constantine, your lawyer indicated that at
20 the next conference you wish to listen in on the phone
21 rather than to be in court.

22 Isn't what you wish?

23 DEFENDANT CONSTANTINE: Yes, your Honor, just
24 due to the cost of travel. If it is something simple we
25 can do it over the phone.

1 THE COURT: The only problem is -- I'm willing
2 to grant that application. But the only problem is we
3 don't know exactly what is going to come up at a
4 conference. It may seem to be just a very short
5 conference, and it can turn out to be a much longer
6 discussion.

7 I will allow you to appear by phone. But
8 obviously you should contact Mr. Conway or Mr. LaRusso.
9 If it turns out that another issue would be raised, either
10 you want to be here or they want you to be here, then you
11 can make arrangements to be here in person.

12 THE DEFENDANT CONSTANTINE: I understand. Thank
13 you.

14 THE COURT: So, I have a waiver before me. You
15 are proposing December 9th?

16 MR. LaRUSSO: Yes, your Honor.

17 THE COURT: Your client is willing to exclude
18 the time?

19 MR. LaRUSSO: Yes. I went over it with him and
20 he understands and has signed the form.

21 THE COURT: Mr. Haley, in terms of moving
22 forward right now, is this what you and clear client would
23 like to do, and not set a motion for a conference?

24 MR. HALEY: There will be an application to
25 appear before this Court before December 9th for purposes

1 of a bail hearing.

2 With respect to the December 9th date we are
3 willing to waive speedy trial to continue this. On
4 December 9th I think we will be in a position to move
5 forward, with not only the supplemental trial schedule but
6 to set a trial date.

7 THE COURT: I was hoping to do that today but
8 I'm fine given all the discovery to wait another month to
9 set the motion schedule and trial date.

10 Let me confirm it with your clients, there was
11 no reason written in on the waiver. Can I just write
12 review discovery by the defense?

13 MR. LaRUSSO: Absolutely, your Honor.

14 MR. HALEY: Absolutely, your Honor.

15 THE COURT: I will write that in. Review of
16 discovery by defendant.

17 Mr. Constantine and Mr. Kenner, you heard the
18 attorneys, they are asking to adjourn this case until
19 December 9th so that they can continue to review the
20 voluminous discovery in this case, and obviously you can
21 continue to review it as well, and discuss with them so
22 you can decide what motions you wish to make prior to the
23 trial, and obviously be prepared for the trial itself.

24 By signing this waiver you are agreeing to
25 exclude the time under the Speedy Trial Act until December

1 9th for those reasons.

2 Is that what you want to do Mr. Mr. Constantine?

3 THE DEFENDANT CONSTANTINE: Yes, your Honor.

4 THE COURT: Mr. Kenner?

5 THE DEFENDANT KENNER: Yes, your Honor.

6 THE COURT: I will grant that request.

7 As Mr. Haley pointed out, I'm always available
8 to the extent issues come up, bail or anything else, you
9 can come in before this date. Other than that the next
10 conference date is December 9th at 1:00 p.m.

11 I exclude the time from today to December 9th
12 under Title 18, United States Code, Section 3161(h)(7)(A),
13 in order to allow the defendants and counsel to review the
14 enormous discovery, and decide how to proceed with respect
15 to the motions and prepare for trial. I find the ends of
16 justice are served by granting a continuance which
17 outweighs the interest of both the defendants and the
18 public in a speedier trial, and I have so ordered the
19 waiver.

20 So, you can go to Judge Spatt.

21 MR. LaRUSSO: Thank for your indulgence.

22 THE COURT: I will deal with the inspection of
23 the content of the computer requested by Mr. Kenner and
24 his counsel. I have reviewed the letters, including the
25 government's declarations, and I received Mr. Haley's

1 response to that. And I just want to focus both sides in
2 terms of my questions at this point.

3 Mr. Haley, I guess you want to have a hearing to
4 question the government experts who put in those
5 declarations.

6 I don't think that is necessary at this point
7 because they articulated in these declarations their
8 concern about any time you turn on a computer and start
9 accessing files, which I also think is self-evident, to me
10 at least, that when anyone goes on the computer and starts
11 accessing the files, that the metadata -- things can be
12 altered. So, that is self-evident to me that that is a
13 concern at any time.

14 That obviously doesn't mean that the defendant
15 shouldn't ever be able to access the computer. But that
16 is the issue.

17 The reason I offered you -- I don't believe a
18 hearing is necessary at this juncture is you and your
19 client haven't put anything in to dispute that. In other
20 words, you don't have an expert declaration that says what
21 the government expert is saying isn't true, that nothing
22 happens when you access a computer, is that there is no
23 problem in terms of altering information, creating new
24 metadata.

25 So, you have not put in anything to dispute the

12
1 basics of what they are saying. So, I don't think there is
2 an evidentiary hearing necessary to call them in.

3 My further concern is not only have you not
4 disputed what they said about that, but you haven't really
5 explained to me as to why your client thinks he needs to
6 access the original computer at this juncture.

7 So, they put in something which I think
8 demonstrates good cause for why the computer shouldn't
9 just be accessed for no reason.

10 I think in most cases the defense doesn't access
11 the original computer, they get the image, whether in
12 child pornography cases or other cases there is no need or
13 request to access the original.

14 In light of the issues they raised, which I
15 believe are valid, and in light of the fact that I don't
16 think I have anything from a computer expert from your
17 side, or your client or yourself, explaining why you need
18 access to the original at this point, my concern is in
19 your letter you request not just access to a computer,
20 which I will clearly give you -- if you want an expert to
21 make their own mirror image and you don't want to rely on
22 the government's image, I think that is certainly
23 permissible for the defendant to do, to create their own
24 mirror images and they have concern about the government
25 doing that. But that is not your request.

1 Your client hasn't indicated that he has
2 reviewed what the government has provided and believes
3 that there are additional materials on the computer and
4 not on the mirror image hard drive, or if they are
5 claiming they are on the mirror image, he doesn't belabor
6 on the original, giving a reason to examine the computer
7 directory to see if something happened. We are not having
8 that situation here either.

9 It appears to me based on your letter that your
10 client would prefer every week to go to the U.S.
11 Attorney's Office for a few hours and review the documents
12 on the original computer. That is not a reasonable
13 request.

14 It is the equivalent of the government producing
15 copies like in the old days, where they make photocopies
16 of all the documents and produce it to the defense, and
17 the defense saying we don't like the photocopies. We
18 would like to sit in the conference room all day and have
19 the defendant excused from jail to review the originals.

20 Or another analogy would be if there was a
21 weapon in an evidence bag and it was a case involving
22 fingerprints, and the defendant says I want to open the
23 bag and handle the weapon. And the question would be what
24 would be the reason to do that? You are potentially
25 altering the item. And it should stay in the evidence bag

1 unless the defendant has a reason for opening up the bag
2 and inspecting it physically.

3 That is my concern. And you have not explained
4 to me why you believe at this point there is something
5 wrong with the mirror image the government has given you.

6 MR. HALEY: Judge, perhaps I can allay the
7 Court's concerns in that regard.

8 Some time ago we were provided two stand alone
9 terabit hard drive of my client's Macbook computer. It is
10 an Apple based operating system.

11 And I believe this issue has been indeed
12 explored before not only on the record, but by the way of
13 some letters to me.

14 I know your Honor is exceedingly busy but you
15 are always on trial when I pass this courtroom and that is
16 to the Court's credit. And I don't think the Court had an
17 opportunity to look at those letters, nor should your
18 Honor look at those letters

19 Let me say, your Honor, what we have encountered
20 from day one is an instance where we were provided the two
21 terabit hard drive, and I have no doubt that they are
22 image copies of my client's Macbook computer. However, it
23 is an Apple based operating system, dumped into two hard
24 drives.

25 My client is incarcerated in the Queens

1 Correctional Facility.

2 The only computer there for his use is a PC
3 Microsoft based software computer. Essentially when he
4 mates the terabit hard drive to the PC Microsoft based
5 computer he gets what he describes as Egyptian
6 hieroglyphics. And I take him at his word as far as that
7 is concerned.

8 We have been unable to utilize the information
9 contained on that image hard drive and, therefore, the
10 dispute.

11 There are two letters, Judge, that I would like
12 your Honor to at least read before your Honor makes a
13 final determination on the issue. And that is the
14 September 4th letter of Mr. Miskiewicz, when your Honor
15 asked Mr. Miskiewicz to explore this issue and my response
16 the following day.

17 So, rather than belabor the record with those
18 arguments, I respectfully, and I mean respectfully, ask
19 your Honor to look at those two letters so your Honor
20 would have a better understanding as to the problem we
21 encountered. So that your Honor may have a better
22 understanding that this issue was a bona fide issue from
23 the defendant's perspective. It is not a subterfuge and
24 not some sort of back doorway, as the government accuses,
25 to modify or adjust the original files on the data or

1 files contained on the original Macbook computer.

2 The letter addresses the problems I encountered
3 trying to resolve the matter myself without the
4 government's assistance.

5 All they said is here they are. Here are the
6 hard drives. If you can't access it, your problem.
7 Figure it out.

8 I'm paraphrasing it, your Honor.

9 If your Honor takes a look at those two letters
10 you will have a better idea of the issue.

11 THE COURT: And I'm looking through my file
12 here, and I remember from my memory that I had
13 Mr. Miskiewicz check with the facility and make sure there
14 is no ongoing technical problem.

15 Is my memory correct on that?

16 MR. MISKIEWICZ: Yes, your Honor.

17 And what the warden reported to me, although he
18 had frequent or daily contact with Mr. Kenner and he was
19 well aware of this issue. He was never advised by
20 Mr. Kenner or Mr. Haley the results of that contact that
21 there was any technical issue. And if there was a
22 technical issue he would be more than willing to resolve
23 it through whatever other technical means that would be
24 appropriate.

25 That is what they reported to me and that is

1 what I said in my letter.

2 MR. HALEY: May I respond. Warden Cirello (ph)
3 has been a prince. As a matter of fact, he has been so
4 cooperative I repeatedly told this Court my appreciation.
5 And with a different warden in place in a different
6 facility this case would have been consumed with discovery
7 disputes.

8 Every time I contacted him he was there for me.
9 Every time I ask for additional library time for my client
10 he gives it. He has been extremely cooperative.

11 If you look carefully what the issue is, when
12 Mr. Miskiewicz contacted Warden Cirello (ph) he actively
13 reported he has been cooperative. I have not even engaged
14 the government in that process. It is the warden and
15 myself who resolved all those issues without government or
16 court intervention.

17 The problem is you are correct. I have not said
18 Warden Cirello (ph), I need the Queens private
19 correctional facility to purchase a computer to put in
20 your facility that is an Apple based operating system
21 computer in order that my client might access those files
22 given to me by the United States Government. I haven't
23 done that because I don't believe it is his
24 responsibility.

25 So, when Warden Cirello (ph) reports no

1 technical issues in this perspective. He is right I have
2 not raised the issue with the warden.

3 He is aware my client had the two terabit hard
4 drive.

5 In my letter I was encouraged the last time we
6 were in court because when you asked the government to
7 look into the issue, and I also read the government's
8 previous submissions. As I recall one of the submissions
9 said we, the government, will make a technician available
10 to help resolve this.

11 I thought that what might occur is there is to
12 be some discussion with the government's expert and the
13 Queens Correctional Facility to straighten this house.

14 To the extent you are raising it as a stalking
15 horse, have your technician come to the facility and
16 access the terabyte and put it in the computer and if this
17 comes up the way we say Mr. Miskiewicz can stand here and
18 say we have misled the Court, and I don't think that has
19 happened.

20 THE COURT: I don't think your client is making
21 up the fact that he can't access the information. I'm
22 just concerned that this has gone on for so long.

23 The bottom line is the following: If the jail
24 does not have the equipment to process that hard drive,
25 then the equipment will be provided. If it has to come

1 out of CJA funds it will. And I will authorize you to
2 purchase a computer; and I will tell the jail it has to be
3 kept somewhere in the jail so he can review that hard
4 drive, unless the government has some alternative
5 suggestion or you have some alternative suggestion.

6 I think that is the answer, that the equipment
7 to read that particular hard drive has to be put into the
8 jail. Unless you tell me there is another solution, that
9 is what I will do. That is my solution. My solution is I
10 will ask Mr. Miskiewicz to confirm with the warden if he
11 doesn't have the equipment to read that hard drive, and I
12 will do it in the -- you can do it in the next couple
13 days; and if the answer is yes, you can purchase then
14 under CJA funds the equipment necessary to have that at
15 the jail.

16 MR. HALEY: Thank you, your Honor.

17 I am not an expert, if you look at Macbook
18 computers or Amazon dot com. You can Google it. There
19 are various models and various Mac type computers. My
20 concern is I would purchase a Macbook computer and because
21 it has an old operating system that is not compatible with
22 the operating system of my client's current Mac
23 computer --

24 THE COURT: Mr. Miskiewicz, by a week from today
25 I want you to confirm with the jail that that disk cannot

1 be reviewed -- someone should physically take that disk,
2 if they believe there is equipment there, and put it in so
3 someone can confirm that they have accessed that disk and
4 they have gotten the information that Mr. Kenner says he
5 can't get. If they can't do that we will have another
6 conference to figure out the issue.

7 If they are saying we just don't have the
8 equipment to do that, then I will ask that you consult
9 with one of the government's forensic computer people to
10 describe what particular computer Mr. Haley would need to
11 obtain, what particular version he needs to acquire. I
12 don't want him to go out and purchase the wrong version.

13 MR. HALEY: Thank you.

14 I believe the simplest solution, assuming the
15 expert confirms what we are telling the Court, whether CJA
16 funds or funds of the government, it is coming out of same
17 taxpayer's pocket, can't they simply give us a compatible
18 computer?

19 I know from Warden Cirello (ph), based on
20 letters I have already sent to him, that people allow such
21 computers to come into the facility is.

22 THE COURT: That would be better.

23 Mr. Miskiewicz, if there is some computer that
24 is already out there that the government has and can just
25 be loaned to the jail for the duration of this case that

1 would be preferable. I don't know if it is possible.

2 MR. MISKIEWICZ: I will make inquiry, your
3 Honor. I don't want to speak for the office. I have
4 never seen the government purchase a Macintosh operating
5 system.

6 THE COURT: I don't mean purchase. There may be
7 a used one not utilized sitting somewhere.

8 MR. MISKIEWICZ: I will look into it.

9 THE COURT: The government will get back to me
10 on that within a week.

11 On the issue of the request to inspect the
12 internal contents of the computer, my ruling is that the
13 request is denied without prejudice to renewal by the
14 defense once Mr. Kenner and his lawyer got an opportunity
15 to review the mirror image, and or expert to review the
16 mirror image.

17 And the expert that they retain, if they want to
18 do their own mirror image for any reason I will permit
19 that. Or if Mr. Kenner's counsel after reviewing the
20 mirror image believes there is some aspect to that that is
21 inaccurate, or created some type of issue with respect to
22 examining the original I will consider it at that time.

23 Otherwise the government will have to show good
24 cause that -- because of the frustration which is
25 legitimate on Mr. Haley and Mr. Kenner's part to review

1 the documents, so not to rely on the original as a
2 discovery tool.

3 Now, let's move to the bail issue.

4 MR. HALEY: Your Honor, may I make a final
5 comment as relates to my request for an evidentiary
6 hearing with respect to the computer?

7 THE COURT: Yes.

8 MR. HALEY: And I reviewed that issue in my
9 letter, Judge, some time ago.

10 Now, rightly or wrongly, and your Honor
11 ultimately will make that determination, I mentioned a
12 case decided by the Second Circuit United States v.
13 Ganas.

14 My reading of the case, Judge, is I believe that
15 my client is entitled to the return of his original
16 Macbook computer. And once the government has obtained an
17 imaged forensic copy of the hard drives of both
18 instruments, and indeed, I quoted what the Second Circuit
19 had to say in commenting upon today's technology.

20 When your Honor mentions, and correctly so, that
21 I have not submitted expert affidavits as relates to the
22 issue, you are correct.

23 However, I look at what the Second Circuit had
24 to say. It is in my letter and I don't mean to quote it
25 to delay the record. But I respectfully ask your Honor

1 before your Honor makes a final determination on that
2 issue, to just read all of my arguments as set forth in my
3 letters. Because, Judge, it is not my intention to speak
4 at great length and further burden this Court.

5 THE COURT: Again, I understand the Ganas
6 decision. I don't think it stands for a proposition that
7 the defendant is entitled to his computer back. It was a
8 very particular situation involved in that case.

9 On the issue of the return of the computer, you
10 have not made a motion on that. But I don't want to
11 burden you with another motion. My view on that is: We
12 talked about the possibility of having a stipulation,
13 although we have the issue that Mr. Constantine and his
14 lawyer have to agree to that stipulation, too.

15 Certainly, under the circumstances we have now,
16 it is a kind of chicken and the egg situation where you
17 are asking me for access to the original and at the same
18 time you are saying you need to have it returned.

19 As long as your client is able to review the
20 mirror image it is fine. I'm certainly concerned on
21 returning the computer to him when he has not had a chance
22 to see the mirror image. If there is a discrepancy later
23 to what is on the mirror image, it can be returned.

24 Certainly, at this juncture it is not
25 appropriate to return the computer when there is still a

1 dispute with regard to the mirror images and whether or
2 not someone gets access to the computer.

3 If we get to that point where you or your client
4 says you have reviewed the mirror image and contests what
5 is contained on the mirror image, and Mr. Constantine's
6 lawyer has a similar view, we are in a different posture.

7 There is no basis at this point in this case
8 where we are still fighting over access to the mirror
9 image or ability of your client to review it or of
10 returning the computer back to him.

11 MR. HALEY: I will make one further comment.

12 The argument is not addressed to the mirror
13 image at this point because your Honor I believe has come
14 up with a solution. I think that will be resolved
15 shortly.

16 The issue with respect to Ganas is an issue of
17 a computer having arguably relevant information for the
18 prosecution and highly personal information that this
19 computer contains. It is ten years of my client's life on
20 that computer. A lot of information on that computer.

21 Assume an expert gets on the stand and says to
22 this court once on day one we physically have this
23 computer and we turn it on and we have the imaged hard
24 drive, that the image hard drive freezes what is on the
25 computer from that day forward. Whatever data entry or

1 files there are or documents there are on that it is
2 frozen in time. We have cloned that item.

3 I respectfully submit to the Court if you
4 receive that kind of testimony at trial, and let's assume
5 a circumstance provides some cataclysmic event, the
6 original computer was destroyed, not on the part of the
7 government, no fault on the part of the government, the
8 Court will likely rule based on that testimony this is
9 authenticated. I have expert testimony.

10 So that the original computer, there is no need
11 for that original computer to stay in the hands of the
12 United States Government once you have cloned it. It
13 either becomes a second issue, as I read Ganas, and they
14 have an obligation within a reasonable period of time to
15 purge the personal information even on the imaged hard
16 drive.

17 THE COURT: Again, I understand what you are
18 saying. We are definitely not at that point in the case.
19 If there is a point that you and your client reviewed the
20 imaged computer and Mr. Constantine and his lawyers agree
21 to it, I believe the government expert will probably say
22 that is what they believe when they make the mirror image.
23 Unless it is undisputed, we are not to that situation.

24 MR. HALEY: Thank you.

25 I will move on, Judge.

1 THE COURT: On the issue of bail -- just a
2 second, we will take a two minute break and I will be
3 right back.

4 MR. HALEY: Yes, your Honor.

5

6 (Whereupon, a recess was taken.)

7

8 THE COURT: So, on the bail issue, again, I have
9 read your papers. It is in detail. You don't have to
10 read everything in the letters. I will give you a chance
11 to highlight whatever you wish to highlight at this point.

12 Does the government wish to highlight anything
13 from your letters?

14 MR. MISKIEWICZ: No, your Honor, unless you have
15 questions.

16 THE COURT: I have no questions.

17 Mr. Haley.

18 MR. HALEY: I think most critical is the Court's
19 order of detention pending trial on December 4th, 2013.

20 It is clear from that order of detention pending
21 trial that the Court says, on consent, without prejudice
22 to a future bail application.

23 I did not represent my client on that day back
24 on December 4th. I did speak with Ms. Chavis, and my
25 understanding is what transpired is that the government

1 previously submitted detention letters.

2 As an aside the government always has an
3 advantage, because before the indictment is filed and they
4 go before the grand jury, they conducted in this case at
5 least four or five years of investigation.

6 So, the detention letter is actually often
7 written even before the defendant appears in court, so
8 they have the opportunity to marshal the evidence and
9 present argument and submit the detention letter on the
10 day of the defendant's arraignment.

11 Ms. Chavis, like myself often, look to provide
12 ourselves with sufficient time to marshal our arguments --

13 THE COURT: So you don't spend a lot of time on
14 things I will look at it de novo. I did say without
15 prejudice. I will not look at it under the changed
16 circumstances issue. I'm looking at it fresh. Because I
17 agree with you that there was no substantive argument at
18 that time.

19 I didn't see in your letter that you are
20 actually proposing a particular package.

21 MR. HALEY: No, your Honor.

22 What I propose to do is I propose is we set this
23 down on November 14th for a detention hearing, two weeks
24 from today -- excuse me, the 21st, Judge, two weeks from
25 today if it meets with the Court's schedule for purposes

1 of a detention hearing.

2 THE COURT: That is fine. And I will hear from
3 you on this issue. But to the extent you are requesting
4 it be an evidentiary hearing where you get to issue
5 subpoenas with respect to the issue of the documents that
6 the government had identified as forged, I don't believe
7 that that is necessary at this juncture.

8 I certainly did reference that in one of the
9 bail hearings as part of the government's proof. But I
10 went back and looked at their original detention letter.
11 It is literally one sentence of a single spaced, very
12 lengthy letter. And although I did reference that when I
13 was talking about the government's evidence and the weight
14 of the government's evidence, it was certainly not a
15 despondent aspect of this case.

16 The government in its most recent letter has
17 explained a little bit more how some of the issues may be
18 collateral to the main proof they are relying on here.

19 I think it is something I don't want to rush
20 into it today, so we can set it down for another day. But
21 I don't believe at this juncture an evidentiary hearing on
22 those forged documents or alleged forged documents are
23 necessary.

24 I saw your client's declaration or affidavit,
25 and I understand he disputes that. But for purposes of a

1 bail hearing, unless it is going to be a dispositive
2 issue, it is unusual for a judge to have a mini-trial on
3 some aspect of the case.

4 MR. HALEY: I agree, Judge.

5 THE COURT: So, on November 14th we will have an
6 argument.

7 Again, at that time you should have some
8 proposal as to what you are proposing, if I were to agree
9 with you, as to exactly what your client is proposing to
10 address which are the extremely serious concerns based on
11 what I have reviewed here.

12 What were you suggesting, November 14th? Do you
13 have a time?

14 MR. HALEY: Your Honor, I would suggest 10:00
15 o'clock because it may very well be an evidentiary
16 hearing.

17 I want to alert the Court as follows -- excuse
18 me, November 21.

19 THE COURT: I just told you it is not going to
20 be an evidentiary hearing. Right now it is argument on
21 the issue of bail. I do not expect any witnesses on that
22 day.

23 MR. HALEY: Your Honor, is the Court's ruling I
24 cannot call my client as a witness on that day?

25 THE COURT: I thought you were talking about the

1 government.

2 No, if you want to call your client, that is
3 fine. I will certainly give you permission to call your
4 client on that date. I thought you wanted the government
5 to have to put on witnesses.

6 THE CLERK: You are not here on November 21.

7 MR. MISKIEWICZ: Your Honor, can I be heard on
8 the proposed date?

9 THE COURT: Yes.

10 MR. MISKIEWICZ: I'm not sure if it is November
11 14th or 21st or December 21st.

12 I'm available on November 14th.

13 I'm beginning a trial before Judge Wexler on the
14 17th, and I'm advised he will sit on Fridays, so I will be
15 on trial all that day. I will not be available on the
16 21st.

17 THE COURT: Since the 14th is not a great date
18 for you, so how about the 13th next week, on Thursday?
19 Mr. Haley, are you around that day?

20 MR. MISKIEWICZ: I can be available, your Honor.

21 MR. HALEY: Yes, your Honor.

22 THE COURT: 11:00 a.m. on next Thursday,
23 November 13th for a bail argument. And if the defense
24 wishes to present any evidence, fine.

25 But I don't want Mr. Kenner to testify

1 unnecessarily. If he wants to testify about what he put
2 in his declaration for purposes of the bail, I'm accepting
3 as true that there is a dispute about those forged
4 documents, and I'm not considering that as part of the
5 strength of the case. I understand he is disputing that.
6 I understand what he wants to testify about, but if he
7 wants to testify about the forged documents I am assuming
8 what he is saying is true. And it is not dispositive
9 because the government on that particular issue outlined
10 other things that they believe warrants his detention.

11 MR. HALEY: Judge, I got it and I appreciate
12 your Honor's comment. I can assure you that will not be
13 addressed for purposes of the evidentiary hearing.

14 I must alert, and it is out of the ordinary --

15 THE COURT: It is out of the ordinary for a
16 defendant wanting to testify on detention at an
17 evidentiary hearing. And nine years as a judge, and a
18 prosecutor for a long time I never heard it. But he is
19 entitled to it if he wants.

20 MR. HALEY: Your Honor, there is a certainly
21 reality. The reality is when your Honor speaks in terms
22 of a bail package. My client doesn't have the financial
23 wherewithal to post a bail package here.

24 The issue for this Court's ultimate
25 determination is whether or not the government can rely on

1 wholly proffered statements when they argue weight of the
2 evidence, and when they argue risk of flight, to justify
3 the continued pretrial detention of my client.

4 We have a right, as I understand the statute, to
5 proceed by way of proffer. We also have a right, as I
6 understand the statute, to proceed by way of evidence.

7 We have presented evidence with respect to the
8 forged documents, and your Honor accepted that. So it is
9 not eliminated as a factor in your Honor making the
10 determination as to whether my client should be released
11 on an unsecured appearance bond with as much secured
12 conditions as this Court feels appropriate, including an
13 ankle bracelet as the case with Mr. Constantine.

14 The only way I can address what we maintain as
15 false statements when they talk about my client secreting
16 money in safe deposit boxes, when they tell your Honor my
17 client has a Mexican passport, which is simply false, and
18 when they give you a recitation of the facts in a proffer
19 that is coming from witnesses who have given presumably
20 statements to the government, not under oath, is to
21 present evidence to the Court so the Court might weigh a
22 government's proffer against sworn testimony.

23 Now, whether it is Mr. Kenner or whether it is
24 some other witness I choose to call to address those
25 issues, other than the forged document issues, is

1 something I'm entitled to do as I read the statute, your
2 Honor.

3 I don't want to mislead the Court, Judge. Our
4 final position at the conclusion of the hearing will be
5 one that my client ought to be released on an unsecured
6 appearance bond. He has no prior criminal record. This
7 is a non-violent crime. The presumption does not apply.
8 The statute clearly sets forth that this Court shall
9 impose no financial condition that shall result in the
10 pretrial detention of the defendant.

11 The statute goes on to remind the Court -- I
12 will not lecture the Court -- that the presumption of
13 innocence still prevails. And sometimes we lose sight of
14 that in detention hearings. And then the default is what
15 do you have to offer in terms of property or cash or
16 surety to justify the bail?

17 This bail application, Judge, is addressed to
18 your Honor in an effort to persuade this Court that my
19 client is not a danger to the community; he does not pose a
20 risk of flight; and we are prepared to present evidence to
21 refute the proffered evidence presented by the government.

22 Thank you.

23 THE COURT: I will see you next week. Okay?

24 MR. MISKIEWICZ: Thank you, your Honor.

25 (End of proceedings.)